IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ANTONIO ABEL, a single person, and KEITH FREEMAN, a single person, Appellants, v. CITY OF ALGONA, a Washington municipal corporation; STEVEN T. JEWEL and JANE DOE JEWELL, husband and wife; DAVID HILL and JANE DOE HILL, husband and wife; and JOSEPH SCHULZ, a single person, Respondents.	)	No. 63599-9-I DIVISION ONE UNPUBLISHED OPINION FILED: July 6, 2010

SPEARMAN, J. —Abel and Freeman were employed by the City of Algona as police officers. The City placed both officers on paid administrative reassignment for a period of approximately four months, during which the City instigated investigations into allegations of misconduct by Abel and Freeman. After the investigations were concluded, the officers were reinstated and exonerated. Abel and Freeman filed suit against the City of Algona in King County Superior Court, alleging various causes of action under state and federal law based on their treatment by city officials during and after the investigations. The case was removed to federal district court. The officers resigned from their positions with the Algona Police Department several months after filing their suit. Their federal-law claims were dismissed on summary judgment and

their state-law claims for negligent hiring, negligent supervision, and breach of employment agreement were remanded to King County Superior Court. The City moved to dismiss these claims on summary judgment . Abel and Freeman's response to the motion included materials from their proffered expert, Donald Van Blaricom. The City moved to exclude these materials. The trial court granted the City's motion to exclude and dismissed the remaining claims. Abel and Freeman appeal those rulings. We affirm.

FACTS

In October 2006, the City of Algona gave notice to police officers Antonio Abel and Keith Freeman that they were being placed on paid administrative reassignment[1] pending investigation of alleged misconduct. The notices stated that the administrative reassignment did not constitute disciplinary action.

The investigation arose from an incident that took place on October 21, 2006. That day, Dwain Beck, a member of the Algona City Council, called Officer Freeman on Freeman's personal cell phone, alleging that Kim Carter had trespassed onto his property. Carter had reportedly gone to Beck's home several times in an effort to collect the remainder of a judgment that he owed her for an automobile accident. When Freeman received the call, he was at the police station but about to get off duty.

[1] The notices given to both officers stated that they were not to conduct agency business unless directed by the Chief of Police, nor report to duty as regularly scheduled. The officers were required to call the department daily during the week and remain at their residences from 8 a.m. to 12 p.m. and from 1 p.m. to 5 p.m. They were required to surrender their Algona Police Department equipment to the department, including their badges, weapons, building keys, and cell phones. They could not access the department's computer equipment. They would be compensated for any authorized department activities requiring the use of their personal vehicles except for travel to and from their residences. They were required to submit time sheets. They could take sick and vacation leave provided it was pre-approved.

He suggested that Beck obtain an anti-harassment order, but Beck asked him to issue a verbal no-trespass order instead. Freeman asked Abel, who had just come on duty, to accompany him. The two went to Carter's home and gave her a verbal no-trespass order. Carter agreed to refrain from trespassing onto Beck's property.

After the encounter, Carter complained to her neighbor Joseph Scholz, who was the mayor of the City of Algona at the time. Carter told Scholz that Beck had said to her that the police worked for him and she had better watch her back. Scholz told her that she should contact Algona Chief of Police Steven Jewell. Carter contacted Jewell and informed him of her belief that Beck had improperly used his influence as a member of City Council to cause the police officers to warn her off.

By October 24, 2006, Jewell had initiated an investigation into Carter's claim of misconduct. On October 27, Jewell notified Freeman that he was being "placed on administrative reassignment with pay pending the outcome of the investigation(s)." Abel officially received notice on October 30, 2006. At Jewell's request the City of Federal Way Police Department (FWPD) conducted a criminal investigation into the allegations. The investigation concluded in mid-November. The FWPD's final report found no evidence that either officer had committed a crime. An associate city attorney for the City of Lakewood was appointed as a special prosecutor. He reviewed the report and concluded in early January 2007 that there was not sufficient evidence to charge either officer with a crime. David Hill, who was by then the mayor of Algona, sent a letter to the Washington State Patrol asking that agency to investigate whether the officers' alleged conduct violated any Algona Police Department administrative regulations. The WSP Internal Affairs Section began its investigation on January 12.

On February 15, 2007, interim chief of police A. W. McGehee sent letters to Abel and Freeman explaining that the criminal investigation had been concluded and they were authorized to return to duty immediately, pending the outcome of the administrative investigation.

On May 18, 2007, Abel and Freeman filed suit against the City of Algona, Steven Jewell, David Hill, and Joseph Scholz[2] in King County Superior Court. The officers alleged that they had been harmed by the personal and political conflict between Dwain Beck and other city officials, including Jewell, Scholz, and Hill. This conflict was allegedly due to Beck's political position as a city council member and his aspiration to become mayor. Abel and Freeman specifically alleged the following causes of action: violation of their rights to equal protection and due process under state and federal law, negligent hiring and negligent supervision of Steven Jewell, and breach of an employment agreement.

The WSP concluded its administrative investigation at the end of May 2007. On June 19, 2007, the City of Algona removed Abel and Freeman's suit to the United States District Court for the Western District of Washington. Less than a week later, after reviewing the WSP's report, the City of Algona concluded that neither officer had violated any administrative regulations, and both officers received a full exoneration from the City. Abel and Freeman resigned from their positions in February and June of 2008, respectively.

In October 2008, on the City's motion for summary judgment, the federal district court dismissed the officers' federal claims. The remaining state-law claims were

[2] The defendants will be referred to collectively as the "City."

remanded to King County Superior Court.

On April 10, 2009, the City moved for summary judgment on the remaining claims of negligent hiring, negligent supervision, and breach of employment agreement. Abel and Freeman filed a response. Attached to their counsel's declaration were materials from and related to their proffered expert witness, Donald Van Blaricom. The City moved to exclude these materials from the record. The trial court granted the City's motion to exclude the Van Blaricom materials in its order granting the City of Algona's motion for summary judgment. The court noted that even if it had ruled otherwise on the motion to exclude, its ruling on summary judgment would not have been affected.

Abel and Freeman appeal from the order granting summary judgment and excluding the Van Blaricom materials. Regarding the decision granting summary judgment, Abel and Freeman argue that the trial court "tacitly" ruled that they were not damaged as a matter of law because the City paid their salaries during their suspension and criminal investigation. They claim that the trial court's ruling sets a bad public policy by allowing the government to evade liability by paying them during any wrongful or illegal employment action. Alternatively, Abel and Freeman argue that the court should consider whether they were damaged by their alleged constructive termination from their positions.

The City contends that Abel and Freeman's claims were properly dismissed because (1) they did not put forth allegations sufficient to create a genuine issue of material fact regarding their negligent hiring, negligent supervision, and breach of employment agreement claims; (2) they failed to exhaust their administrative remedies

for the breach of employment agreement claim; and (3) they were unable to demonstrate any compensable damage arising from their paid administrative reassignment, during which they accrued all sick leave, vacation pay and pension benefits.

ANALYSIS

Trial Court's Order Striking and Excluding Van Blaricom Materials

Abel and Freeman contend that the trial court erred in excluding materials from and related to Donald Van Blaricom, their "Police Administration Expert."[3] Van Blaricom is a retired police chief who was expected to testify that the City's actions toward the officers were not in accordance with accepted police practices. The materials were submitted as Exhibit L attached to the declaration of Abel and Freeman's counsel, Walter Olsen, in support of their response to the City's motion for summary judgment. They included a transcript of Van Blaricom's deposition, his "Draft and Preliminary Report," his "Response of Plaintiffs' Police Practices Expert to Defense Expert's Rebuttal Report," and his curriculum vitae.

We review de novo a trial court's evidentiary rulings made in conjunction with a summary judgment motion. Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998); Warner v. Regent Assisted Living, 132 Wn. App. 126, 135, 130 P.3d 865 (2006).

Abel and Freeman offered evidence of Van Blaricom's expert opinion to establish that the City's conduct toward them was inconsistent with generally accepted

[3] The trial court's reason for granting the motion to exclude is not evident from its order.

standards of police policy and procedures regarding internal investigations and disciplinary issues. They argue that Van Blaricom's opinions on these issues would help the jury understand the evidence related to the implied and express agreements that existed between the City and the officers and help the jury determine whether or not the City breached these agreements. Thus, they contend, the evidence was admissible pursuant to ER 702 and the trial court's exclusion of the evidence was error.

However, as discussed further below, Abel and Freeman have not provided any evidence of any express or implied agreements they had with the City other than the Collective Bargaining Agreement (CBA). With regard to the CBA, Abel and Freeman claim that the City breached Articles 17.2, 17.3, and 17.10, but they do not explain how Van Blaricom's opinions are relevant to these specific claims. Nor do they explain how his opinions relate to the City's argument that Abel and Freeman failed to exhaust the remedies available under the CBA, or to Abel and Freeman's response that they should be exempt from this requirement because further pursuit of the grievance procedure would have been futile.

Because Abel and Freeman have not established that Van Blaricom's opinions are relevant to any material issues, they would not have assisted the jury in understanding the evidence or in determining a fact in issue. Accordingly, the trial court was correct to exclude them and we will not consider them on appeal.[4]

Summary Judgment Dismissal of Claims

The court reviews summary judgment decisions de novo, engaging in the same

[4] In reaching this conclusion we have thoroughly reviewed Van Blaricom's deposition and other materials and, like the trial court, have concluded that even if we were to consider them we would reach the same result.

inquiry as the trial court. Michak v. Transnation Title Ins. Co., 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003). "'Summary judgment is appropriate when "there is no genuine issue as to any material fact and … the moving party is entitled to a judgment as a matter of law."'" Michael v. Mosquera-Lacy, 165 Wn.2d 595, 601, 200 P.3d 695 (2009) (quoting Locke v. City of Seattle, 162 Wn.2d 474, 483, 172 P.3d 705 (2007)) (quoting CR 56(c)). A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). All facts and reasonable inferences are viewed in favor of the non-moving party. Malnar v. Carlson, 128 Wn.2d 521, 535, 910 P.2d 455 (1996).

A burden-shifting scheme applies to summary judgment proceedings. Michael, 165 Wn.2d at 601. The burden to "demonstrate there is no genuine dispute as to any material fact" is initially "on the party moving for summary judgment." Folsom, 135 Wn.2d at 663. "'After the moving party submits adequate affidavits, the nonmoving party must set forth specific facts which sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as to a material fact.'" Michael, 165 Wn.2d at 601 (quoting Meyer v. Univ. of Wash., 105 Wn.2d 847, 852, 719 P.2d 98 (1986)). "[T]he nonmoving party 'may not rely on speculation, [or] argumentative assertions that unresolved factual issues remain.'" Michael, 165 Wn.2d at 602 (quoting Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986)). If the non-moving party fails to come forward with evidence sufficient to establish each of the elements of a claim that are put into issue by the moving party, summary judgment is properly granted. White v. Solaegui, 62 Wn. App. 632, 636, 815 P.2d 784 (1991).

Negligent Hiring Claim

In a claim for negligent hiring, a plaintiff must show that (1) the employer knew or, in the exercise of ordinary care, should have known of the employee's unfitness at the time of hiring; and (2) the negligently hired employee proximately caused the plaintiff's injury. Carlsen v. Wackenhut Corp., 73 Wn. App. 247, 252, 868 P.2d 882 (1994) (citing Peck v. Siau, 65 Wn. App. 285, 827 P.2d 1108 (1992)). Notably, "[a] claim for negligent hiring presupposes that the employee in question was unfit for the job," and is not properly supported where a plaintiff fails to establish unfitness. Whaley v. State, Dep't of Soc. & Health Servs., 90 Wn. App. 658, 676, 956 P.2d 1100 (1998) (citing Carlsen, 73 Wn. App. 247; Guild v. St. Martin's College, 64 Wn. App. 491, 827 P.2d 286 (1992)).

The City argues that summary judgment was proper because Abel and Freeman did not show that any material facts were in dispute regarding whether Steven Jewell was unfit for the position of police chief when he was hired. It argues that because Abel and Freeman did not show that Jewell was unfit, there was no evidence to suggest that the City knew or should have known of any such alleged unfitness. Furthermore, "there is no evidence to support the Officers' assertion that they were injured by Chief Jewell's alleged unfitness by virtue of the Officers' placement on paid administrative reassignment, during which they continued to receive all pay and benefits, and on charges in regard to which they were ultimately exonerated."

Where the City establishes that Abel and Freeman's allegations did not show that any material facts were in dispute regarding whether Jewell was unfit for the position of police chief, Abel and Freeman bear the burden of setting forth specific facts that disclose the existence of a genuine issue as to a material fact. See Michael, 165

Wn.2d at 601.

Abel and Freeman contend that Jewell was unfit because he was hired as part of the City's policy and practice to clean house of its long-term employees and their unions without just cause. They also allege that the City did not investigate Jewell's background and that he was the only candidate interviewed.

Even assuming, as Abel and Freeman argue, that Jewell was hired for the sole purpose of "cleaning house," this is only evidence of the motive of the persons who hired him; it is not evidence which goes to the issue of Jewell's fitness for the job of police chief. And Abel and Freeman make no other claims regarding his qualifications or lack thereof.[5] In addition, although they claim that the City's hiring process was inadequate, they do not allege or offer any evidence showing that a more thorough investigation into Jewell's background would have revealed any disqualifying information or that interviewing additional candidates would have changed the hiring outcome.

While asserting that Jewell was unfit, Abel and Freeman fail to set forth sufficient facts to meet their burden. Therefore, we affirm the trial court's dismissal of the negligent hiring claim.

Negligent Supervision Claim

"The theory of negligent supervision creates a limited duty to control an employee for the protection of third parties." Niece v. Elmview Group Home, 131 Wn.2d 39, 51, 929 P.2d 420 (1997). A plaintiff must show that: "(1) an employee acted

[5] Counsel for Abel and Freeman conceded at oral argument that they did not have evidence that Jewell was unfit to be chief of police or that Jewell had a criminal history.

outside the scope of his or her employment;[6] (2) the employee presented a risk of harm to other employees; (3) the employer knew, or should have known in the exercise of reasonable care, that the employee posed a risk to others; and (4) that the employer's failure to supervise was the proximate cause of injuries to other employees." Briggs v. Nova Servs., 135 Wn. App. 955, 966–67, 147 P.3d 616 (2006), aff'd, 166 Wn.2d 794, 213 P.3d 910 (2009).

The City argues that the trial court appropriately dismissed the negligent supervision claim because Abel and Freeman failed to provide evidence demonstrating a genuine issue of material fact as to a single element of that claim.

Appellants argue that if the City hired Jewell to clean house, then the City negligently supervised him. They contend that the City's negligent supervision consisted of failing to ensure that Jewell completed the investigation into Abel and Freeman's alleged misconduct more quickly, and failing to ensure that Jewell acted promptly to terminate the officers' administrative reassignment and exonerate them after certain stages in the investigation were completed.

Even assuming Abel and Freeman's allegations to be true, they do not create a genuine issue of material fact as to the first element of their negligent supervision claim, i.e., whether Jewell's actions in investigating the allegations of their misconduct were outside the scope of his employment. Indeed, Jewell's actions in overseeing the

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[6] This element exists in the negligent supervision tort because when an employee commits negligence while acting *within* the scope of employment, another theory of liability—respondeat superior—applies. See Rodriguez v. Perez, 99 Wn. App. 439, 451, 994 P.2d 874 (2000). When an employer does not disclaim liability for the acts of its employees, a negligent supervision claim is absorbed into the respondeat superior tort claim. See Niece, 131 Wn.2d 39; Shielee v. Hill, 47 Wn.2d 362, 287 P.2d 479 (1955); Gilliam v. Dep't of Soc. & Health Servs., 89 Wn. App. 569, 950 P.2d 20 (1998).

investigation into the officers' alleged misconduct clearly took place within the scope of his duties as the chief of police. Furthermore, as the City points out, the broad discretion of police departments with respect to their employees has been well established by case law.[7] The Algona Police Department's discretion in this regard was acknowledged by the federal district court that ruled upon Abel and Freeman's claims,[8] and is incorporated into the CBA.[9] Because Abel and Freeman fail to put forth facts disclosing the existence of a genuine issue of material fact as to whether Jewell acted outside the scope of his employment, we affirm the trial court's dismissal of the negligent supervision claim.

Breach of Employment Agreement Claim

The crux of Abel and Freeman's breach of employment agreement claim is that

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[7] As a general principal, local governments are afforded "wide latitude" in the "dispatch of [their] own internal affairs." Kelley v. Johnson, 425 U.S. 238, 247, 96 S. Ct. 1440 (1976) (quoting Cafeteria & Restaurant Workers Local 473 v. McElroy, 367 U.S. 886, 896 (1961)). Furthermore, as the United States Supreme Court noted, "[W]e have often recognized that government has significantly greater leeway in its dealing with citizen employees than it does when it brings its sovereign power to bear on citizens at large." Enquist v. Oregon Dep't of Agric., 553 U.S. 591, 128 S. Ct. 2146, 2151, 170 L. Ed. 2d 975 (2008). The Eighth Circuit Court of Appeals noted, "The police department, as a paramilitary organization, must be given considerably more latitude in its decisions regarding discipline and personnel regulations than the ordinary government employer." Crain v. Bd. of Police Comm'rs of Metro. Police Dep't of St. Louis, 920 F.2d 1402, 1409 (8th Cir. 1990).

[8] The court explained:

> Whatever the wisdom in restricting Plaintiffs to their homes during working hours for four months, the Court defers to the decision of the Algona Police Department to impose such a restriction pending the outcome of the criminal and administrative investigations into Plaintiffs' conduct. The Court concludes that the reassignment was rationally related to the police department's interest in ensuring that their officers were in compliance with the regulations and the law.

[9] Article 2 of the CBA stated, in part:

> 2.1 Direction of Workforce – The Union recognizes the prerogative of the Employer to operate and manage its own affairs in all respects in accordance with its lawful mandate …. This shall include, but not be limited to, the rights to (a) direct employees; (b) hire, promote, transfer, assign and retain employees ….
>
> 2.2 Employer Rules and Regulations – The Employer shall have the right to make such reasonable direction, rules and regulations as may be deemed necessary by the Employer for the conduct and the management of the affairs of the Employer ….

the City's actions in placing them on administrative reassignment breached express and implied terms of the Collective Bargaining Agreement (CBA) between their union and the City, the Algona Police Department's "Policy Manual," and the City's disciplinary practices respecting another employee. They point to Article 17 of the CBA and refer to the City's response to allegations of misconduct against Officer Daniel Moate[1] as evidence of the specific contractual terms that were breached. Abel and Freeman also allege that the City constructively discharged them.

At the outset, the City contends that the breach of employment agreement claim was properly dismissed as a matter of law because the officers failed to exhaust the CBA's grievance procedure prior to bringing their lawsuit. The City argues that even if the grievance procedure was properly exhausted, the only allegedly breached provisions of the CBA that were cited by Abel and Freeman were not violated because the officers' paid administrative reassignment was not "discipline" as that term is defined in the CBA. Furthermore, the City argues that, while Abel and Freeman claim that other "implied and express employment agreements" were breached, they fail to point with specificity to any contractual term or agreement.

In response to the City's argument that they failed to exhaust the CBA's grievance procedure, Abel and Freeman argue that they initially attempted to do so, through their attorney or union representative, but that the City either denied the grievance or claimed it was not well-taken because they were not the subjects of disciplinary action. Moreover, they argue that considerations of fairness and

[1] Moate admitted to Conduct Unbecoming an Officer for receiving oral sex from a barista while on duty, and received three days of paid administrative reassignment and ten days of unpaid suspension.

practicality excuse their claims from exhaustion requirements.[11]

We hold that the trial court properly dismissed Abel and Freeman's breach of employment agreement claim. First, evidence in the record indicates that Abel and Freeman failed to exhaust their claims as required by the CBA.[12] "Where an agreement provides for a method of resolving disputes between the parties, that method must be pursued before either party can resort to the courts for relief." Hansen v. City of Seattle, 45 Wn. App. 214, 218, 724 P.2d 371 (1986) (citing Tombs v. Nw. Airlines, Inc., 83 Wn.2d 157, 517 P.2d 1028 (1973)). And "where a collective bargaining agreement establishes grievance and arbitration procedures for the redress of employee grievances, an employee must exhaust those procedures before resorting to judicial remedies." Lew v. Seattle Sch. Dist. No. 1, 47 Wn. App. 575, 577, 736 P.2d 690 (1987) (citing Moran v. Stowell, 45 Wn. App. 70, 724 P.2d 396 (1986)). However, "an employee's failure to exhaust contractual grievance procedures does not bar an action by the employee for breach of contract if the employee has been prevented from exhausting his or her contractual remedy by his or her union's wrongful refusal to process the grievance." Lew, 47 Wn. App. at 578. A party's failure to exhaust can be excused under considerations of fairness or practicality, for instance when "pursuing the available remedies would be futile" because of bias or prejudice on the part of the discretionary decision makers. Baldwin v. Sisters of Providence in Washington, Inc., 112 Wn.2d 127, 131, 769 P.2d 298 (1989).

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[11] Abel and Freeman refer to the administrative reassignment as a "suspension."

[12] Abel and Freeman argue broadly that they initially attempted to comply with the grievance procedures, but they do not dispute the City's precise characterization of the steps they took, nor do they allege that they ultimately attempted to complete all three steps of the grievance process.

The CBA mandates a three-step grievance procedure.[13] The City concedes that Abel and Freeman likely complied with the first two steps. But it argues that they failed to comply with the third step. The City's argument is corroborated by evidence in the record which indicates that Abel and Freeman's grievance was withdrawn by their union, and they did not apparently attempt to fulfill the third step.

The grievance process took place as follows. By letter dated January 18, 2007, addressed to Mayor Hill, the department director, and Steven Jewell, Abel and Freeman's attorney advised that a grievance was being initiated and demanding that the City and union complete the grievance procedure. The City confirmed its receipt of the grievance. On February 1, 2007, union representative Ron Harrell sent a letter to Mayor Hill regarding the grievance. On February 6, interim police chief A. W. McGehee responded by letter to Abel and Freeman's attorney and the mayor, denying the step-one grievance. Subsequent to McGehee's denial, Harrell sent a letter to Mayor Hill on May 11 stating that he was advancing the grievance to step two. Harrell's letter included language asking "that the City of Algona end any ongoing

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[13] The relevant text of the CBA stated:

> 4.2 Step One 1: – Employees shall notify their Department Director in writing, stating the specific section/s of the agreement allegedly violated. The written grievance shall include all of the facts supporting the grievance, the names of any witness and the remedy requested. If the steward or Union Representative considers the grievance to be valid, then the employee and the steward or Union Representative will contact the Department Director or designee and shall attempt to effect a settlement of the complaint.
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> 4.3 Step Two – If the grievance is not resolved to the Union's satisfaction at Step 1, the Union shall submit the grievance in writing to the Mayor or designee. The mayor or designee shall render a written decision at the earliest convenience.
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> 4.4 Step Three – The Union may appeal an adverse decision of the Mayor or designee to a neutral arbitrator. The Union shall give written notice to the Employer of its intent to submit a grievance to arbitration within thirty (30) calendar days of the Mayor's decision. Within ten (10) calendar days of the Union's request to arbitrate, the Union shall request the appointment of an arbitrator from the Public Employment Relations Commission.

investigations involving Freeman and Abel and remove any reference to the investigations in any personnel files the City maintains on the Officers." Mayor Hill responded by letter dated July 2, 2007, stating that the internal investigation of Abel and Freeman had ended and that they had been informed of the outcome. The letter confirmed that the City had a policy of removing references to investigations from personnel files unless discipline was warranted, "which in this case it was not." The City advised that it would keep those materials in a separate "complaint file" for as long as state law mandated. Neither the union, nor Abel, nor Freeman, nor their attorney appealed from the letter of Mayor Hill or took any action to advance the grievance to step three. In his deposition testimony, union representative Harrell explained:

> Ultimately [the grievances] were withdrawn, primarily because we achieved the objective we were looking for, which was to get them back to work without any loss of pay benefits, seniority, all the rest of that stuff. That would have been ultimately the remedy we were looking for, and we got that. At that point there was no need to pursue them further.

While arguing broadly that they attempted to comply with the grievance procedure, Abel and Freeman do not dispute that their union withdrew their grievance. Nor do they claim that their union wrongfully refused to continue the grievance process, which also could excuse their failure to exhaust the contractual grievance process. Lew, 47 Wn. App. 575. Finally, Abel and Freeman fail to show that their efforts to pursue the available remedies would have been futile, or that the City was biased, to support their argument that their claim should be exempted from the exhaustion requirement under considerations of fairness and practicality.

Second, even if they did exhaust their claims, Abel and Freeman fail to put forth facts showing the existence of a genuine issue of material fact as to their breach of

employment agreement claim. Even assuming, as Abel and Freeman argue, that the administrative reassignment constituted de facto discipline, they offer no evidence that the cited provisions of Article 17[14] of the CBA were violated. The guarantees contained within the cited provisions state that any formal discipline of employees would be applied by department directors, that an employee subject to discipline would be afforded the right to have a union steward or representative present, and that employees could request an attorney to be present during a departmental investigation. Abel and Freeman present no evidence that their discipline was applied by someone other than a department director, that they were deprived of their right to have a union steward or representative present, or that they were deprived of their right to request an attorney to be present during the investigation.

Moreover, as the City points out, Abel and Freeman fail to allege with specificity what other express or implied terms were breached. A party resisting summary judgment "may not rest upon the mere allegations or denials of his pleading, but his response … must set forth specific facts showing that there is a genuine issue for trial." CR 56(e). Yet Abel and Freeman do not cite or refer to any specific provisions in the "Policy/Operations Manual," and they do not explain why the City's disciplinary actions in a wholly unrelated incident involving a different officer, different facts, and different

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[14] The provisions of the article that Abel and Freeman claim were breached state:

17.2 Application of Discipline – Any formal discipline of employees shall be applied by Department Directors. Discipline shall include documented: oral warnings, written warnings, suspension or discharge for just cause. …

17.3 An employee subject to discipline shall be afforded the right to have the Union Steward and/or Union Representative present, if requested.

…

17.10 All employees may request an attorney of their choosing to be present during a departmental investigation. The cost of such attorney shall be paid by the employees.

circumstances gave rise to a contractual agreement between the City and Abel and Freeman. It is not the function of an appellate court "to comb the record with a view toward constructing arguments for counsel." In re Estate of Lint, 135 Wn.2d 518, 532, 957 P.2d 755 (1998). For the foregoing reasons, we affirm the trial court's dismissal of the breach of employment agreement claim.

In sum, we hold that the trial court properly excluded the Van Blaricom documents and, as a matter of law, properly dismissed the negligent hiring, negligent supervision, and breach of employment agreement claims.

Affirmed.

Spearman, J.

WE CONCUR:

Schindler, J.

Cox, J.